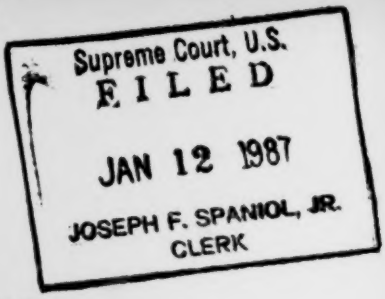
86 1254

No.



IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

October Term, 1986

FREDERICK TUPPER SAUSSY III,
Petitioner

vs

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

By: Frederick Tupper Saussy III,
in propria persona

6 University Avenue
Sewanee, Tennessee 37375
(615) 598-5209

SAINT ANDREW'S PRESS / LEGAL WORKS, ST ANDREWS, TENNESSEE 37372 (615) 598-5353

48 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW:

Does the issuance of a criminal summons by a deputy clerk upon a U.S. Attorney's information amount to lawful institution of process sufficient to toll the statute of limitations, when neither the information nor the summons is supported by a judicial finding of probable cause?

REASONS FOR GRANTING WRIT OF CERTIORARI:

1. The United States Court of Appeals for the Sixth Circuit has

(a) decided a federal question in conflict with applicable decisions of this Court, and

(b) sanctioned a departure so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. This case brings up a question of federal law which has not been precisely settled by this Court but should be.

TABLE OF CONTENTS

Page

1. Question for Review & Reasons for Granting Writ of Certiorari i

2. Table of Contents ii

3. Table of Authorities iv

4. Statement of Jurisdiction vi

5. Statement of Statutes Involved vi

6. Statement of Case 1

7. Argument 5

I. AN ACCUSED'S RIGHT TO A SHOWING OF PROBABLE CAUSE UPON OATH IS A RIGHT PROTECTED BY THE FOURTH AMENDMENT 5

II. THE COURTS BELOW DENIED SAUSSY'S FOURTH AMENDMENT RIGHTS IN HOLDING THAT CRIMINAL PROCESS, INITIATED WITHOUT PROBABLE CAUSE, TOLLS THE STATUTE OF LIMITATIONS 9

III. THE FEDERAL RULES OF CRIMINAL PROCEDURE ARE NOT BEYOND MANIPULATION FOR UNCONSTITUTIONAL ENDS, AND THE COURT BELOW ERRONEOUSLY UPHELD ONE SUCH MANIPULATION 14

Page

IV. RIGHTS CANNOT BE UNLAWFULLY ACQUIRED 18

CONCLUSION 19

8. Appendix 21

A. US Court of Appeals for the Sixth Circuit: Order Denying Rehearing 21

B. US Court of Appeals for the Sixth Circuit: Judgment & Memorandum Opinion Affirming Conviction 22

TABLE OF AUTHORITIES

Cases

Page

Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250 (1927) 8, 15
Fall v. United States, 49 F. 2d 506 (D.C. Cir., 1931) 18
Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975) 11, 12
Hawkins v. State, 20 Ala. App. 285, 101 So. 514 (1924) 13
United States v. Jaben, 333 F. 2d 535 (8th Cir., 1964) 10
Jaben v. United States, 381 U.S. 214, 85 S.Ct. 1365 (1965) 10, 11, 12, 13
Mammoth Oil Company v. United States, 275 U.S. 13, 48 S.Ct. 1 (1927) 18
McCoy v. State, 27 Ala. App. 18, 165 So. 263 (1936) 13
Miles v. State, 94 Ala. 106, 11 So. 403 (1892).13
*Pan Am. Petroleum & Trspt. Co. v. United States*273 U.S. 456, 47 S.Ct. 416 (1927) 18
Rider v. United States, 149 F. 164 (8th Cir., 1906).7
Slater v State, 230 Ala. 320, 162 So. 130 (1935).14
Sparks v. State, 39 Ala. App. 517, 104 So. 2d 764 (1958) 14
United States v. Achen, 267 F. 595 (E.D.N.Y., 1920) 7
United States v. Baugh, 1 F. 784 (E.D. Va., 1880).7
United States v. Baumert, 179 F. 735 (N.D.N.Y., 1910) 7

United States v. Greenberg, 320 F. 2d 467 (9th Cir., 1963) 9
United States v. Millican, 600 F. 2d 273 (5th Cir., 1979), Cert. denied 445 U.S. 915, 100 S. Ct. 1274 16
United States v. Morgan, 222 U.S. 274, 32 S.Ct. 81 (1911) 7
United States v. Polite, 35 F. 58 (D.S.C., 1888).7
United States v. Quaritius, 267 F. 227 (E.D.N.Y., 1920) 7
United States v. Reilly, 20 F. 46 (D. Nev., 1884) 7
United States v. Smith, 40 F. 755 (E.D. Va., 1889) 7
United States v. Tureaud, 20 F 621 (E.D. La., 1884) 6, 7
United States v. Wells, 225 F. 320 (W.D. Tenn., 1913) 7
Weeks v. United States, 216 F. 292 (2nd Cir., 1914) 8
Yaffee v. United States, 276 F. 497 (6th Cir., 1921) 8

STATEMENT OF JURISDICTION

1. Review is sought of the judgment and memorandum opinion of the United States Court of Appeals for the Sixth Circuit entered on October 1, 1986, affirming conviction in the United States District Court, Eastern District of Tennessee.

2. A timely Petition for Rehearing *en banc* was denied on November 13, 1986.

3. The jurisdiction of the trial court was conferred by 18 U.S.C., §3231. The jurisdiction of the appellate court was conferred by 28 U.S.C., §1291. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred by 28 U.S.C., §1254(1).

STATEMENT OF STATUTES INVOLVED

A. United States Constitution - Fourth Amendment
B. United States Code, Title 26
   26 U.S.C., §7203
   26 U.S.C., §6531

C. Federal Rules of Criminal Procedure
   Rule 3
   Rule 4
   Rule 5
   Rule 5.1
   Rule 7
   Rule 9

A. UNITED STATES CONSTITUTION - FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

B. TITLE 26

26 U.S.C., §7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C., §6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under

the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years -

> ...(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

...Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitations on criminal prosecutions, the rules of section 6513 shall be applicable.

C. FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate.

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that

an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

Warrant. The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place...

Rule 5. Initial Appearance before the magistrate

(a) In general.... If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirments of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons,

appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18USC 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses not triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the prelimin-

ary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absense of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensible to the interests of justice.

Rule 5.1. Preliminary Examination.

(a) Probable cause finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule

12.

(b) Discharge of defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

Rule 7. The Indictment and the Information

(a) Use of indictment or information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

.... (c) Nature and contents.

(1)*In general.* The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indict-

ment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

Rule 9. Warrant or Summons upon Indictment or Information

(a) Issuance. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court....If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1)*Warrant.* The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court or, if the information or indictment charges a minor offense, before United States magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court or, if the information or indictment charges a minor offense, before a United States magistrate at a stated time and place....

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

FREDERICK TUPPER SAUSSY III,
Petitioner

vs

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

STATEMENT OF CASE

The Advisory Committee's note to the 1974 Amendment of Rule 9, Federal Rules of Criminal Procedure states:

> A defendant can, *at a proper time*, challenge an information issued without probable cause.

When is that proper time? The Sixth Circuit Court of Appeals in this case has ruled *never*.

This case presents for review by this Honorable Court a dangerous practice that has been quietly developing over the years within the federal sys-

tem. The practice enables prosecutors to bypass the constitutional obstacles of probable cause determination by a neutral and detached magistrate in bringing an accused to trial. It has reached the point of acceptability in many districts across the nation.

The practice, which is upheld by the Sixth Circuit Court of Appeals herein, consists of issuing summonses, **without a judicial determination of probable cause**, to persons charged by **unverified informations** filed by a U.S. attorney. It is a means by which the executive ignores constitutional and statutory requirements and established judicial precedent and reaches out into the community to bind anyone of his choosing to the stress, trauma, expense,* and manifold other penalties of a criminal trial.

Holding an accused to answer without a showing of probable cause is especially injurious to the innocent, for it is precisely because they have committed no crime that no probable cause exists.

On July 31, 1984, the U.S. Attorney for the Eastern District of Tennessee at Knoxville filed one such unverified information in Chattanooga charging Frederick Tupper Saussy III with violation of Title 26, United States Code, §7203 for the years 1977, 1978, and 1979.

The statute of limitations, found at 26 U.S.C., §6531, extends to six years for violations of

---

*Petitioner can comment with authority on expense: he has been devastated financially by the proceeding, can no longer retain his attorney, and is obliged to file this petition *pro se*. However, a special arrangement has been made wherein a licensed attorney will represent him before this Court should certiorari be granted.

§7203 and can be further extended for periods of time equal to delays caused by suits challenging I.R.S. summonses issued to collect information. Several years earlier, approximately 3½ months had been consumed in a suit initiated to enforce I.R.S. civil summonses, meaning that prosecution for the tax year 1977 was required to be instituted by August 4, 1984 to avoid the bar of the statute of limitations. The information was a scant 4 days under the wire.

A summons was subsequently issued by a deputy court clerk **without a magistrate's or judge's finding of probable cause.** The information was not supported by any document upon oath to which perjury attached, nor was the information verified or affirmed by the oath of office of the U.S. Attorney.

Despite his belief that the summons was void for the above reasons, Saussy did appear out of apprehension that a failure to do so would result in the issuance of a warrant for his arrest, which could mean a costly bond, incarceration, and prejudicial publicity. The record shows that Saussy challenged the information's lack of probable cause on four separate occasions; each challenge was frustrated by the court.

Trial was set for January 24, 1985, and Saussy appeared. Before the jury was sworn, he again challenged the information's lack of probable cause, and was again rebuffed. Fearful that a jury's verdict would cure the defective information and summons, thus *precluding the chance for review of the question by this Honorable Court*, Saussy informed the District Court that he could not allow himself

to stand trial under the circumstances. Peacefully, he attempted with his family to leave the courtroom. This was perceived by the court as disorderly behavior. Saussy was arrested on the spot, found guilty of criminal contempt, and sentenced to 90 days in prison, of which he served 50.

On March 21, 1985 the U.S. Attorney procured a federal grand jury "superseding indictment" for the identical crimes in the identical years - 1977, 1978, and 1979. The government publicly admitted the purpose of the indictment was to remedy the probable cause deficiency: "Now Mr. Saussy has his probable cause," said an assistant U.S. Attorney in a *Chattanooga Times* news story.

The indictment did appear to satisfy the probable cause demands for the years 1978 and 1979. But for the year 1977, the indictment brought up a new question: Does an indictment filed 7½ months after the expiration of the statute of limitations relate back to a void information filed 4 days before the day of expiration? In other words, is an unverified information upon which a summons was issued without a finding of probable cause sufficient to toll the statute of limitations?

On pretrial motion, the District Court answered in the affirmative. Then, on May 30, Saussy was acquitted by a jury for the years 1978 and 1979, but was convicted for the year 1977. The Sixth Circuit Court of Appeals affirmed the conviction and denied a petition for rehearing *en banc*.

Your petitioner has endured considerable hardship in keeping the question pure, in preserving the issue for review by this Honorable Court. Both government and citizens are in need of a definitive

statement of rights contained in federal summonses issued upon unverified executive informations.

ARGUMENT

I. THE RIGHT TO A SHOWING OF PROBABLE CAUSE UPON OATH IS A RIGHT PROTECTED BY THE FOURTH AMENDMENT

The information has its origin in English common law. In the Court of King's Bench, the King's attorneys could file informations in the name and on behalf of the King to institute prosecutions for misdemeanors. The "probable cause" element for such informations instituted in this court was said to be founded originally upon the oath of office of the King's lawyers. They would acquire information from law enforcement officers regarding commission of crimes and, upon their satisfaction of the existence of probable cause, possessed the right to file informations void of any record showing of probable cause. The King's attorneys were empowered to proceed in cases where there was *little or no* evidence to support the charge. This unbridled right eventually degenerated into the practice of filing informations even *against all evidence*. See generally, annotation at 120 A.L.R. 358, entitled "Leave of Court to File Information."

Both the British and their colonial American brethren were plagued by politically motivated prosecutions having no valid factual foundation. The constitutional amendments governing criminal procedure – Amendments Four, Five, Six and Eight in the Bill of Rights – were supposed to end

that plague in this land.

The Fourth Amendment provides that "No warrants shall issue, but upon probable cause, supported by oath or affirmation..." The purpose of this language was explained by the court in *United States v. Tureaud*, 20 F. 621 (E.D. La., 1884) as follows:

> But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses; for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation – not by the king, because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States; for the constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse. See *State v. Mitchell*, 1 Bay, 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General WIRT holds that even the president is controlled

> by this amendment. All arbitrary informations, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedures, and the learning about informations was left valuable only as showing what proofs were considered adequate in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind. (20 F., at 622)

Virtually an unbroken line of precedence demonstrates that a showing of probable cause is essential if the filing of an information is to institute the charges and hold the accused to answer in court. Almost from the outset of the federal practice of instituting prosecutions by means of informations, the federal courts repeatedly insisted that probable cause be shown before issuance of a warrant. See *United States v. Baugh*, 1F. 784 (E.D. Va., 1880); *United States v. Reilly*, 20 F. 46 (D. Nev., 1884); *United States v. Tureaud*, 20 F. 621 (E.D. La., 1884); *United States v. Polite*, 35 F. 58 (D.S.C., 1888); *United States v. Smith*, 40 F. 755 (E.D. Va., 1889); *Rider v. United States*, 149 F. 164 (8th Cir., 1906); *United States v. Baumert*, 179 F. 735 (N.D.N.Y., 1910); *United States v. Wells*, 225 F. 320 (W.D. Tenn., 1913); *United States v. Quaritius*, 267 F. 227 (E.D.N.Y., 1920); and *United States v. Achen*, 267 F. 595 (E.D.N.Y., 1920).

In *United States v. Morgan*, 222 U.S. 274, 32

S.Ct. 81 (1911), this clear principle enunciated by the lower federal courts was confirmed when this Court stated:

> A further answer is, that as to this and every other offense, the 4th Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of facts showing the existence of probable cause. (222 U.S. at 282)

And a decade later, the principle of *Morgan* was enunciated by the Sixth Circuit in *Yaffee v. United States*, 276 F. 497 (6th Cir., 1921):

> The right of the district attorney to file an information is not an absolute and unqualified right. Before doing so he must secure leave of court.
>
> Where it appears to the court by the affidavit filed therewith by the district attorney that probable cause exists for the filing of such information, the court in its discretion may grant such leave, and its order cannot be reversed except for an abuse of discretion. (276 F., at 499)

In *Weeks v. United States*, 216 F. 292 (2nd Cir., 1914), the issue concerned the commencement of a misdemeanor criminal prosecution by means of an unverified information which was not supported by any showing of probable cause. Using the argument that such practice was permissible under English common law, the Second Circuit sanctioned the use of such informations. The Supreme Court seemed to approve the rationale of *Weeks* in *Al-*

brecht v. United States, 273 U.S. 1, 47 S.Ct. 250 (1927), when it stated that probable cause could be supplied by a prosecutor under his official oath. Still, *Albrecht* held that some form of probable cause upon oath was constitutionally required for the lawful institution of criminal proceedings. In the Saussy case, the prosecutor provided *no form* of probable cause to support the information or the summons.

II. THE COURT BELOW DENIED SAUSSY'S FOURTH AMENDMENT RIGHT TO PROBABLE CAUSE IN HOLDING THAT CRIMINAL PROCESS, INITIATED WITHOUT PROBABLE CAUSE, TOLLS THE STATUTE OF LIMITATIONS

The court below completely ignored the substantial support for Saussy's argument that the "superseding indictment" filed after the expiration of the statute of limitations could not lawfully relate back to an unverified information, filed before the statute had been tolled, upon which a summons was issued without probable cause. The court said, "Defendant offers no relevant support for these arguments." (APPENDIX, page 2.)

Defendant *did* offer support. The support was *indeed* relevant: *United States v. Greenberg*, 320 F.2d 467 (9th Cir., 1963) is nearly identical to the case at bar. Here, a complaint attempting to establish probable cause was filed shortly before the running of the statute of limitations on a tax offense. After the statute period had expired, a superseding indictment was returned. The government maintained that the indictment was timely.

The Ninth Circuit disagreed and held that the affidavit supporting the complaint was insufficient to establish probable cause, and thus the entire complaint was insufficient and failed to toll the running of the statute of limitations. An opposite opinion was reached in *United States v. Jaben*, 333 F.2d 535 (8th Cir., 1964), and due to the conflict between the Eighth and Ninth Circuits, this Court granted certiorari in *Jaben*.

In *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365 (1965), this Court resolved the question of the sufficiency of the probable cause necessary to toll the running of the statute of limitations in reference to tax matters. As in the Saussy case instant, the government had argued that a showing of probable cause was not necessary to toll the running of the statute of limitations, but this Court disagreed, stating:

> The argument ignores the fact that the Commissioner's basic functions under the Rules are to make the judgment that probable cause exists and to warn defendants of their rights. (381 U.S. at 218)
>
> Notice to a criminal defendant is usually achieved by service upon him of the summons or arrest warrant provided for in Rule 4. Neither is appropriate absent a judgment by the Commissioner that the complaint shows probable cause, and no other form of notice is specified by the Rules. (381 U.S. at 219)
>
> The better view of §6531 is that the complaint, to initiate the time extension, must be adequate to begin effectively the

> criminal process prescribed by the Federal Criminal Rules. It must be sufficient to justify the next steps in the process – those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing. To do so the complaint must satisfy the probable cause requirement of Rule 4. (381 U.S. at 220)
>
> A dismissal of the complaint before the indictment is returned would vitiate the time extension. (318 U.S. at 220)

Can there be any doubt that *Jaben* requires a judicial determination of probable cause before the statute of limitations is tolled? That probable cause is the **single, solitary factor which institutes the criminal process and tolls the statute?** After *Jaben*, how could any prosecutor in good conscience attempt to obtain a criminal summons or warrant without filing a complaint or information supported by a showing of probable cause upon oath?

The *Jaben* doctrine was again enunciated in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), wherein this Court was asked to review the institution, by prosecutors for the State of Florida, of misdemeanor charges by information unsupported by probable cause (the courts routinely denying probable cause hearings). This Court condemned such procedure as unconstitutional and ruled that probable cause determinations could not be made by the prosecution, but had to be either judicially determined or sanctioned by a neutral and detached judicial officer. In so holding, this Court stated:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. (420 U.S., at 117)
>
> The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard – probable cause to believe the suspect has committed a crime – traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony. (420 U.S. at 120)

Thus, *Gerstein* clearly shows that the prosecutor's decision to file an information is not the probable cause finding mandated by the Fourth Amendment.

The Saussy case herein is largely controlled by both *Jaben* and *Gerstein*. Under *Jaben*, the statute of limitations is tolled only by means of a prosecution commenced by a showing of probable cause. Under *Gerstein*, a prosecutor's decision to initiate a criminal action is not constitutional probable cause. Saussy's prosecutor filed an information not supported by any showing of probable cause and, with no further determination, a deputy clerk issued a summons directing Saussy to appear in court. Under *Jaben* and *Gerstein*, the statute of limitations was not tolled and ran out a few days after

the issuance of the summons. The return of the indictment against Saussy for the year 1977 on March 21, 1985, was therefore clearly stillborn, if this Honorable Court's historical posture is to be respected.

Your petitioner lives in Tennessee, whose constitution permits criminal charges by indictment or presentment only. But 30 miles to the south in the State of Alabama, where informations are permissible, judicial precedence requires the existence and showing of probable cause before any criminal action is lawfully instituted. In *Miles v. State*, 94 Ala. 106, 11 So. 403 (1892), the Alabama Supreme Court held:

> The constitution of the state protects persons from arrest, unless there is probable cause, supported by affidavit. (ll So., at 403)
>
> We find no warrant in the law of this state for putting a party upon trial upon the mere statement of the solicitor, unsupported by a sufficient complaint under oath. (11 So. at 404)

In *Miles*, the statute of limitations had expired and since the case had been instituted without probable cause, it was dismissed. As in this Court's *Jaben*, the Alabama Supreme Court identified the showing of probable cause as the single element signalling the institution of a criminal case, and therefore the only element capable of tolling the running of the statute of limitations. The rationale of *Miles* still continues in Alabama; see *Hawkins v. State*, 20 Ala. App. 285, 101 So. 514 (1924);

Slater v State, 230 Ala. 320, 162 So. 130 (1935); *McCoy v. State*, 27 Ala. App. 18, 165 So. 263 (1936), and *Sparks v. State*, 39 Ala. App. 517, 104 So. 2d 764 (1958).

III. THE FEDERAL RULES OF CRIMINAL PROCEDURE ARE NOT BEYOND MANIPULATION FOR UNCONSTITUTIONAL ENDS, AND THE COURT BELOW ERRONEOUSLY UPHELD ONE SUCH MANIPULATION

Insofar as commencement of a criminal charge is concerned, the Federal Rules of Criminal Procedure (Rules) appear to meet constitutional standards. Whether upon a complaint or an information, probable cause is required before a summons or warrant can be issued.

Complaints serve definite functions. Most often, a complaint is used by a law enforcement officer engaged in his business of ferreting out crime. For a crime committed within his knowledge, he can pursue and apprehend an offender. The method of detaining the suspect in such a situation is typically by complaint; the Rules require that a complaint show the existence of probable cause, upon the complainant's oath. The complaint then becomes the foundation for the issuance of a summons or warrant, without which the accused could not be apprehended for trial.

Informations have a similar purpose, although they are the product of prosecutors not physically engaged in the pursuit of an accused. Typically, proof of the commission of a crime is developed by law enforcement officers who then present such

evidence to a prosecutor. If the prosecutor then determines to proceed criminally, he initiates an information. But the means whereby the subject is held to trial – apprehension – cannot be achieved without warrant or summons, both of which require a showing of probable cause to be constitutionally viable.

This Court's decision in *Albrecht* outlined the procedure a prosecutor must follow in filing an information in order to effect a lawful summons or warrant: the prosecutor had to obtain leave of court to file his information, and leave required a showing of probable cause to the court. (273 U.S. at 5) This was required by Rule 7, prior to 1947.

But in 1947, Rule 7 was amended to permit the filing of informations *without* leave of court. Did the amendment resurrect the hated English prosecutorial privilege of proceeding against an accused without probable cause and *against all evidence*? No. The amendment merely altered the time of showing probable cause from before the *filing* to before the *issuance* of the warrant or summons. The information could be filed without probable cause, but the *capias* could not issue until probable cause had been found by a neutral and detached magistrate.

If it were possible for an accused to be brought constitutionally into court without probable cause, there must certainly be a rule entitling him to a preliminary examination for the determination of probable cause once he's there. Rule 5(a) provides that – when arrested without a warrant – a person is entitled to a showing of probable cause. But, as Saussy learned, a probable cause hearing is denied at Rule 5(c) to all persons charged by information

"before the date set for the preliminary examination." Was it the intent of Congress to assure that all accused citizens would have a probable cause finding except those charged by executive information? God forbid!

United States v. Millican, 600 F.2d 273 (5th Cir., 1979), cert. denied 445 U.S. 915, 100 S.Ct. 1274) construed the Rules so as to arrive at the conclusion that the trial jury's verdict of guilty was a finding of probable cause sufficient to cure the unverified information that had brought Mr. Millican into court. The Fifth Circuit Appeals Court said the District Court had acted "improperly" by denying a showing of probable cause to Mr. Millican, an impropriety that would have amounted to reversible error if only Mr. Millican had not allowed himself to stand trial. Saussy tried to avoid Millican's mistake and was imprisoned for contempt. To Saussy thus far, the promise of the note to Rule 9, that an information can be challenged "at the proper time," is worse than empty verbiage: it's a trap.

The *Millican* court was highly critical of the havoc wrought by unsupported informations upon accused parties, especially in view of the effect Rule 5(c) has on informations in general:

> ..[A] probable cause determination should also be made on the request of a defendant who responds to a summons...It is highly desirable for the district courts to establish, where it is challenged, that the Government has probable cause supported by oath before putting any defendant to trial. (600 F.2d at 277)

Despite the confusion in Rule 5(c), which this Honorable Court could clear up by reviewing this case, the Rules clearly require probable cause showings in misdemeanor cases, whether initiated by complaint or by information. To reason otherwise would be to deny the protections of the Fourth Amendment.

Rules 3 and 4 plainly state that in the complaint procedure, a showing of probable cause must be made before issuance of a warrant or summons. Similarly for informations, Rule 9 clearly and obviously requires that an information be supported by a showing of probable cause. The committee comments to Rule 9 further state the obvious in reference to the probable cause requirement for a summons issued on the basis of an information:

> "A summons may issue if there is an information supported by oath." (Emphasis supplied.)

The same comment then notes that while an indictment *per se* establishes probable cause, an information not supported by probable cause does not.

The Federal Rules simply do not permit the clerk to automatically, routinely issue summonses without the requisite showing of probable cause upon oath. Any such summons, and the information inspiring it, fails to institute lawful process.

Upon Saussy's challenge, the district court should have ordered the U.S. Attorney to file a new information in the clerk's office, along with affidavits or complaints upon oath establishing probable cause. Upon the U.S. Attorney's request,

the clerk could then lawfully have issued the summons. The Rules would have been followed. The Fourth Amendment would have been preserved. And Saussy and his family could have been spared much unnecessary pain, stress, financial deprivation, and mental anguish.

V. RIGHTS CANNOT BE UNLAWFULLY ACQUIRED

The government cannot claim any right, benefit, privilege, or favor which may be acquired by or through an unlawful act. Examples of this principle are legion. For example, the "exclusionary rule" deprives government of benefits to be derived from criminal evidence acquired *via* the violation of the Fourth or Fifth Amemdments.

The government is prohibited from acquiring any benefit, right, or privilege founded upon an unlawful document. An unlawful lease or contract to which the government may be a party confers no right or benefit in favor of either party to the lease or contract.

When the "Teapot Dome" scandal hit Washington, DC, in the early 1920's, the petroleum leases acquired through bribery were voided. See *Pan American Petroleum and Transport Company v. United States*, 273 U.S. 456, 47 S.Ct. 416 (1927), and *Mammoth Oil Company v. United States*, 275 U.S. 13, 48 S.Ct. 1 (1927). And the government agent who was bribed to consummate those leases was ultimately convicted. See *Fall v. United States*, 49 F.2d 506 (D.C. Cir., 1931).

Thus, whether in the criminal or civil arena, if the government seeks to claim or assert any

right, benefit, privilege, or favor against anyone, the same must have been acquired in a lawful and legal manner.

In 26 U.S.C. §6531, Congress gave the government six years to exercise the right to show probable cause that Saussy committed a criminal offense. The best the government could do in all that time was file an unverified information and issue a summons without a showing of probable cause. **We may never know how much of its case was developed during the 7½ months between the expiration of the statute of limitations and the presentation of the case to the grand jury.** But we know certainly that, if the government prevails on this issue, the unverified information will become the standard tool for defeating the purpose of the statute of limitations. Henceforth, to toll the statute indefinitely, prosecutors need only file an unverified information containing the name of an accused, a statute or two, and some legal conclusions. The accused is conveniently held in jeopardy, for months or years, until a case develops.

An unverified information *per se* may be quite lawful in certain circumstances. But used either to toll the statute of limitations or to trigger the issuance of a summons without a showing of probable cause is plainly unlawful. The Fourth Amendment gives no value to such an arbitrary document. The government can claim no right, privileges, or benefits from it.

If §7203 punishes a taxpayer for willfully failing to supply information sufficient to constitute a timely income tax return, surely §6531 punishes the government for failing to supply timely probable cause sufficient to invoke §7203 against a tax-

payer. The ironic truth in this case is that it was the U.S. Attorney who failed to file. His statutory punishment is forfeiture of his right to prosecute Saussy for the tax year 1977.

CONCLUSION

In affirming Saussy's conviction on the single count, both the District Court and the Court of Appeals have declared that a citizen can be pressed into criminal jeopardy by the federal justice system without a showing of probable cause upon oath. It is answer to the unprincipled prosecutor's dream. If sustained, the constitutional obstacles in prosecuting the innocent, for whom a showing of probable cause is impossible, are finally overcome. The government may now criminalize anyone at will, even *against all evidence.*

WHEREFORE, because of the real and profound significance of this issue, Saussy most respectfully petitions this Honorable Court to grant this Petition for a Writ of Certiorari and issue an Order allowing the matter within to stand for briefing on the merits, oral argument and plenary consideration by this Court and directing the court below to certify and transmit the record.

Respectfully submitted,

Frederick Tupper Saussy III,
in propria persona.

APPENDIX

No. 85-5663/5966

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FREDERICK TUPPER SAUSSY III,
Defendant-Appellant

ORDER

*BEFORE: KEITH and GUY, Circuit Judges and BALLANTINE**
United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
FILED NOV. 13, 1986

---

* Hon. Thomas Ballantine, Jr. sitting be [sic] designation from the Western District of Kentucky

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-5663 and 85-5966

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FREDERICK TUPPER SAUSSY, III, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 1, 1986

Before: KEITH and GUY, Circuit Judges; and BALLANTINE, District Judge.*

GUY, Circuit Judge. Defendant, Frederick Tupper Saussy, III, appeals his conviction for willful failure to file a federal income tax return for the year 1977, in violation of 26 U.S.C. § 7203. Defendant argues on appeal that the prosecution was barred by the statute of limitations, and also challenges four jury instructions given by the district court below. Finding no merit to any of the defendant's contentions, we affirm.

*Honorable Thomas A. Ballantine, Jr., United States District Court, Western District of Kentucky, sitting by designation.

I.

On July 31, 1984, a three-count information was filed charging Saussy with willful failure to file federal income tax returns for the years 1977, 1978, and 1979, in violation of 26 U.S.C. § 7203. After several continuances, trial was actually commenced on January 24, 1985, but was aborted due to the disruptive behavior of the defendant. The defendant was held in criminal contempt and the trial was rescheduled.

On March 21, 1985, a superseding indictment, charging the same crimes as were alleged in the July 31, 1984 information, was returned. Trial was held on the indictment on May 29-30, 1985, and the defendant was convicted upon count one and acquitted upon counts two and three of the indictment. Subsequent to trial, the defendant was sentenced to one year in prison and fined $10,000. Costs of prosecution were also assessed in the amount of $2,823.33. Notices of appeal were timely filed as to the conviction and as to the costs awarded.

II.

Statute of Limitations

Simply put, defendant's argument on the statute of limitations issue is that although the information originally filed was within the six-year statutory period set forth in 26 U.S.C. § 6531, it did not toll the statute because it was an "unverified" information. Defendant further argues that the statute was not tolled by the filing of the information; therefore, when the superseding indictment was filed after the six-year limitation period had run, it could not relate back to the previously filed information nor could it be construed to have been filed during a period of time when the statute was tolled. Defendant offers no relevant support for these arguments.

To begin with, there is no doubt that the filing of an information in this type of case would toll the running of the stat-

ute of limitations. Title 26, U.S.C. § 6531 provides that in order to institute an appropriate prosecution under the Internal Revenue laws an indictment must be returned or an information filed within the statutory period. Rule 7(a), Fed. R. Crim. P., specifically provides that an offense of this nature which is punishable by imprisonment for a term of one year or less may be prosecuted by information. Defendant at least impliedly concedes this point, but contends further that this only occurs if the information is "verified" and that the information filed here was "unverified." By "unverified" defendant appears to mean an information that is not supported by some type of affidavit or by some prior determination of probable cause.

There is no requirement in either the statutes or the court rules for the verification of an information. The only requirement is that the information be signed by the attorney for the government. Fed. R. Crim. P. 7(c)(1). *See also United States v. Prickard,* 207 F.2d 472, 474 (9th Cir. 1953).

Defendant's argument that when an information is filed it affords the defendant an opportunity for a probable cause hearing is incorrect. As stated in *United States v. Funk,* 412 F.2d 452, 455 (8th Cir. 1969):

> The use of an information as a formal criminal charge found recognition as early as the beginning days of the Nation. Act of April 30, 1790, C. 9 § 31; 1 Stat. 119. *Albrecht v. United States,* 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927). Today, by use of the information for lesser crimes (and as to felonies where indictment is waived) the issues of probable cause and guilt become merged and tried together. The law has traditionally and constitutionally discriminated between safeguards guaranteed for felonies and those involved in lesser offenses. *Duke v. United States,* 301 U.S. 492, 57 S.Ct. 835, 81 L.Ed. 1243 (1937).

Defendant's argument on this point primarily results from his misapplication of three cases, *United States v. Greenberg*, 320 F.2d 467 (9th Cir. 1963); *Jaben v. United States*, 381 U.S. 214 (1965); and *United States v. Millican*, 600 F.2d 273 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). The issue involved in both *Greenberg* and *Jaben* was whether a *complaint* lacking in probable cause would be sufficient to toll a statute of limitations. Both courts correctly found that it would not. Both cases are distinguishable, however, in that a complaint under the Federal Rules of Criminal Procedure and the applicable statutes is not sufficient to stop the running of the statute of limitations. This is because a complaint does not constitute a formal charge upon which trial may proceed. On the other hand, an information is itself the formal charge and trial may be had upon it without more. *Millican* involves the showing that is required for the issuance of a warrant or summons after an indictment or information has been filed. It does not, as defendant suggests, hold that a probable cause hearing is required in connection with the institution of criminal charges by an information. In fact, *Millican* states directly to the contrary:

> A probable cause determination is not a constitutional prerequisite to filing of the information itself, *Gerstein v. Pugh*, 420 U.S. at 125 n.26, 95 S.Ct. 854, nor have the Federal Rules of Criminal Procedure, in effect since 1946, been construed to require probable cause in an information in order to state a prosecutable offense.

600 F.2d at 276 (citations omitted). *Millican* does state in what appears to be *dicta* that where a summons is issued after the filing of an indictment or information, there should be some sort of probable cause shown as a foundation for the issuing of the summons. *Millican* is specific, however, in holding that if that is not done and the defendant is ultimately convicted "he cannot upset that conviction on the argument

that no probable cause was shown prior thereto." *Id.* at 277-78.[1]

This prosecution was appropriately instituted by information within the period of limitations. The information need not be verified and it does not entitle the defendant to a probable cause hearing. The only question remaining is whether the subsequent indictment filed after the running of the statutory limitations period resulted in a time-barred prosecution.

It is interesting to note, although not determinative of the issue, that the only reason the government proceeded to indictment in this case was to satisfy the defendant's demands for a probable cause hearing. The returning of an indictment by the grand jury, of course, conclusively determines probable cause. The indictment returned was in the same language and charged the identical offense as did the earlier information. Although there appears to be no case dealing specifically with this point, the cases are legion which hold that when an indictment supersedes a previous indictment it relates back to the time the earlier indictment was filed. *See, e.g., United States v. Friedman,* 649 F.2d 199 (3d Cir. 1981); *United States v. Grady,* 544 F.2d 598 (2nd Cir. 1976). *See also United States v. Brewer,* 681 F.2d 973 (5th Cir. 1982) (where the government first proceeded by indictment and then subsequently dismissed the indictment and proceeded by information in a case in which they could have proceeded by information in the first instance).

We can discern no principled reason why, if an indictment relates back to an earlier filed indictment, a subsequently filed indictment should not relate back to an earlier filed information.[2] The charges brought in the indictment were

---

[1]There is no doubt that one served with a summons deemed defective may challenge that summons by moving to quash. By no means does this equate, however, to the proposition that cases started by information entitle the defendant to a probable cause hearing.

[2]This, of course, holds true providing the earlier filed information was appropriate. If, for example, the government had initially pro-

identical to those in the information. The concerns generally underlying statutes of limitations have to do with placing a defendant on notice of the charges brought against him before those charges are presumptively stale. Here, there is no doubt that the defendant was fully apprised of the charges against him before the statute had run, and that he was apprised of those charges in precisely the same language that was used in the subsequent indictment. Under these circumstances, the defendant suffered no prejudice, and defendant's subsequent conviction ratified the United States Attorney's and the grand jury's earlier determination of the existence of probable cause.

III.

Defendant also contends that four different instructions given to the jury were erroneous and prejudicial.

A. *Instruction on "Willfulness"*

Defendant contends that the court's instruction on willfulness was confusing and a misstatement of the law. First, it does not appear to the court that defendant has properly preserved this objection. Fed. R. Crim. P. 30 requires that counsel are to submit to the court written requests for instructions, as counsel did in this case. The court shall then inform counsel of its proposed action upon the requests prior to their arguments to the jury, as the court did in this case. Then, "no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." We

---

ceeded by information in a case that could only be instituted by indictment, the rule might well be different. Here, we are not presented with that problem since it is clear that this offense could be prosecuted by information and the indictment was merely to satisfy defendant's request on the issue of probable cause.

do not find in the transcript of the proceedings below any objection by defendant to this instruction. (TR. 8, 445-455.) Nonetheless, pursuant to Fed. R. Crim. P. 52, this court must consider plain errors or defects affecting substantial rights, even though defendant may not have properly preserved his objection.

Upon review, we find no plain error. First, although defendant contends that the instruction was a misstatement of the law, his entire argument is directed to his contention that the instruction was confusing and could have been simpler. He does not state in what way the instruction was a misstatement. Second, it is well settled that a court is not required to give an instruction in the language a defendant requests, as long as the jury is fully and fairly instructed in the general charge. *United States v. Akins*, 372 F.2d 291, 293 (6th Cir. 1967). *See also United States v. Bizzard*, 674 F.2d 1382, 1389 (11th Cir. 1982); *United States v. Coast of Maine*, 557 F.2d 905, 909 (1st Cir. 1977). We note with approval the statement by the Ninth Circuit in *United States v. James*, 576 F.2d 223, 226-27 (9th Cir. 1978):

> We review a claim of error relating to jury instructions from a unique vantage point. First, neither party, including a criminal defendant, may insist upon any particular language .... On the contrary, the trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented.... Equally important, the propriety of a given instruction, or the failure to give a particular instruction, is not viewed in the abstract; rather, the adequacy of the entire charge taken in the context of the whole trial is our proper scope of inquiry.... Challenges which merely pertain to the trial judge's language or formulation of the charge are reversible only for an abuse of discretion.

(Citations omitted.) We find that the lower court's instruction on willfulness was a proper statement of the law and was not confusing, particularly in the context of the instructions as a whole.

B. *Instruction on Disagreement with the Law*

The court gave an instruction which stated that a defendant's disagreement with the law or his belief that such a law is unconstitutional does not constitute a defense of good faith, misunderstanding, or mistake. Defendant contends that there was no issue as to whether he was justified in his violation of the law or whether he intentionally violated the law because of a disagreement with it. Rather, the issue was whether defendant in good faith believed that what he was doing was in compliance with the law. Defendant contends that this instruction implied to the jurors that what defendant had done was, in fact, a violation of the law.

We first find that defendant's disagreement with the law was made an issue in the case by defendant himself. Defense counsel questioned a number of witnesses, in particular Robert Peters, concerning defendant's questioning of the tax laws and his study of those laws and the Constitution. Peters testified that he believed defendant was sincere in his beliefs. Thus, we find that the jury was properly given an instruction concerning this issue raised by defendant. Second, we do not find that the instruction implies that defendant was in violation of the law, particularly when the instructions are looked at as a whole. "In evaluating the adequacy of jury instructions, they must be taken as a whole." *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1181 (6th Cir. 1983).

C. *Instruction on Tax Returns*

Defendant challenges the following instruction:

> A document which does not contain sufficient information relating to the taxpayer's income from

> which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder.

(TR.8, 506.) Defendant contends that this instruction stated that as a matter of law the tax returns filed by defendant were not tax returns and that the jury *must* find that the government had proved this element of the offense. Defendant contends the question of whether or not the defendant filed a tax return is a question of fact to be decided by the jury.

First, we do not find from the transcript that defendant preserved this objection for appeal, pursuant to Fed. R. Crim. P. 30. Second, we find that the above statement dealt with a legal question rather than a question of fact, and that the court properly instructed the jury as to a legal requirement. Additionally, as discussed above, jury instructions are to be read as a whole. The next sentence in the charge reads, "Whether any document submitted by the defendant constitutes tax returns is a matter for the jury to decide." The court properly stated the law respecting the definition of a return, and left it to the jury to decide whether defendant had properly filed a return.

D. *Instruction on Exercise of Privilege Against Self-Incrimination*

The contested instruction is as follows:

> Now, a taxpayer may not, however, avoid the filing of required income tax returns by claiming his privilege against self-incrimination unless the taxpayer in good faith believes that if he furnishes required information on tax returns, the disclosure of such information will subject him to incrimination and possible prosecution for violation of criminal laws.
>
> The Fifth Amendment privilege or right does not give any person the right to withhold required infor-

mation on a return concerning items the disclosure of which would not incriminate him.

You should bear in mind that disclosure of income from legitimate activities in which no criminal act was involved would not constitute such self-incrimination.

If you find that the Defendant in good faith believed that providing the information called for would violate his right against self-incrimination, even if that belief was a mistaken one, then you must find that he did not act willfully. If you find that he did not act willfully, then you must return a verdict of not guilty.

(TR.8, 509.) The defendant states that a good faith claim of privilege against self-incrimination, although erroneous, is a defense to the element of willfulness which is necessary for a conviction under 26 U.S.C. § 7203. Defendant contends that the instruction was an incorrect statement of the law because "it is only necessary that defendant in good faith believe that his exercise of his fifth amendment privilege is proper under the law," and it "is *not* necessary that he actually believe that the information which he furnishes would in fact incriminate him."

Defendant cites three cases which are inapposite to the proposition he asserts, as they concern alleged misunderstanding of the tax law. That was not alleged to be the case here. Defendant makes this argument because it became clear at trial that he did not believe that filling out his tax returns would leave him open to criminal prosecution. He did write on those returns that he was remaining silent pursuant to his fifth amendment privilege, but at trial he made the following statement: "I understood that if you wanted to exercise the fifth amendment because you didn't want to tell the government anything, and you felt there was a question as to whether or not you were required, it was improper not to

file a return at all, because that would be failing to file." (TR. 352.) Here, defendant merely asserted that he did not want to tell the government anything, not that he was in fear of criminal prosecution. Throughout his testimony he continued to speak about "if" someone wanted to manipulate his tax return or "conceivably" use the information on his return against him. (*See* TR-8, 367 and 371.) His only fears seem to relate to release of information by the government and possible repercussions against his wife's family in Puerto Rico. Defendant testified that he is merely a songwriter with royalties, and that he does not have any income from criminal activity. "I would have to say in all respect it probably would not have incriminated me, because I would have filed a truthful return." (TR.8, 368.) What defendant seems to be be asserting is that he could assert the fifth amendment to protect him from revealing information that he thought might be harmful to him in some way, not that he thought the information would incriminate him. That is not the law.

In *Garner v. United States,* 424 U.S. 648, 655 (1976), the Court held: "Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise." The Court did go on to find that if a defendant has a good faith belief that the information he gives will subject him to criminal liability, however erroneously, his use of the fifth amendment does not constitute a willful failure to file a tax return. However, that good faith belief must relate to a fear of criminal prosecution. In *United States v. Sullivan,* 274 U.S. 259, 264 (1927), Mr. Justice Holmes held that a taxpayer "could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government's blank would bring him into danger of the law." Similarly, in *United States v. Johnson,* 577 F.2d 1304 (5th Cir. 1978), the court found:

> The Fifth Amendment privilege protects the erroneous taxpayer by providing a defense to the prosecution if the jury finds that the claim, though erroneous, was made in good faith.... Three principles may be distilled from the authority: (1) the privilege must be claimed specifically in response to particular questions, not merely in a blanket refusal to furnish any information; (2) the claim is to be reviewed by a judicial officer who determines whether the information sought would tend to incriminate; (3) the witness or defendant himself is not the final arbitor of whether or not the information sought would tend to incriminate. *See generally Albertson v. SACB*, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965); *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) ....

577 F.2d at 1311. Defendant in the present case made a blanket refusal to furnish any information and admits himself that the information sought does not tend to incriminate. We further note that the instruction reviewed and approved by the *Johnson* court is almost identical to the one given in the present case. *Johnson*, 577 F.2d at 1310 n.3. We find that the instruction given was a proper statement of the law.

IV.

Finally, defendant filed a separate appeal as to the costs assessed against him by the district court. However, he has presented no argument to us as to why those costs are improper. We find that the court below properly assessed costs of prosecution for violation of 26 U.S.C. § 7203 as mandated by that statute. Further, the district judge gave careful consideration to defendant's motion to reduce the costs as presented by the government and found several of defendant's objections well taken, reducing the assessment from $6,360.80 to $2,823.33. We find this final figure to be that

required by the statute.

The judgment of the district court is AFFIRMED.